SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Intervenor-appellee, Louis J. Lefkowitz, Attorney General of the State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal from the judgment of the Court of Appeals of the State of New York be dismissed.

Opinion Below

The opinion of the New York State Court of Appeals is reported at 20 N. Y. 2d 370, 229 N. E. 2d 602, and is reproduced in the appendix of appellant's Jurisdictional Statement at p. 18.

Jurisdiction

Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Statutes Involved

New York State Public Authorities Law §§ 2601-3 (Jurisdictional Statement pp. 24-27).

Questions Presented

1. Does the instant case present a justiciable controversy within the jurisdiction of this Court?

2. Does the question of the constitutionality of Public Authorities Law § 2602 raise a substantial federal question requiring plenary review before this Court?

Statement

During 1964, the appellant, a closely held family corporation, entered into three painting contracts with the appellee New York City Housing Authority. Each contract contained a standard paragraph 38 in accordance with Public Authorities Law § 2601, providing that, where a person refuses to sign a waiver of immunity when requested to appear before a grand jury to testify concerning public contracts, such person and any firm, partnership

or corporation of which he is a member, partner, director or officer shall be disqualified for five years from bidding on public contracts and any existing contracts shall be terminated (Jurisd. Statement, p. 24). All three contracts were executed on behalf of the appellant by its president, George Campbell, Jr., who was also a director and stockholder of the corporation.

Early in 1965, appellant's officers, including its president, became aware that the District Attorney of New York County was conducting an investigation before a Grand Jury to determine whether the crime of bid rigging on public contracts, including those entered into by appellant, had occurred in New York County. On March 26, 1965, George Campbell, Jr. purported to resign as president and director of the appellant corporation and to turn over his shares of stock. On the same date he became employed as an "estimator" by the appellant corporation.

The resignation was specifically arranged by the corporation to circumvent the express provisions of the contract containing the statutory language. The complaint alleged that Campbell became aware of the Grand Jury investigation of appellant corporation on March 26, 1965, and was advised by counsel that he "could expect to be subpoenaed and requested to waive statutory immunity".

The officers of appellant corporation were advised by the corporation's counsel "of the penalty that would result if any of us refused to waive immunity". Strangely, of all the officers and directors, only Campbell, "then only tweny-four years of age, and having the fewest years of service with the company, deemed it advisable to refuse to waive immunity", and he was, therefore, requested to offer and did offer his resignation.

On Friday, April 9, 1965, after Mr. Campbell allegedly had already been employed by appellant in his new capacity, the Board of Directors of appellant allegedly met and

purported to accept his resignation. On April 13, Mr. Campbell was served in the office of the corporation's lawyer with the subpoena. On April 14, the Grand Jury met. In accordance with his corporate arrangement, he refused to sign the statutory waiver of immunity and, consequently, was not asked to testify.

By letter dated April 16, 1965, the New York County District Attorney informed the Housing Authority that Campbell had refused to sign such a waiver of immunity. On April 21, 1965, the Authority advised appellant that, pursuant to § 38 of the general conditions of the contracts, the contracts were cancelled and terminated effective immediately and that Mr. Campbell and the corporation were disqualified from doing business with the Authority for five years.

Appellant commenced an action by way of an order to show cause for an order *pendente lite* enjoining the Housing Authority from barring or disqualifying appellant from future bidding and directing restoration of its name to the qualified bidder list. Appellee Housing Authority cross-moved to dismiss and the motion was granted only to the extent of staying the action pending determination of appellant's appeal from an order of the Supreme Court, New York County granting appellees' motion to dismiss the petition in a proceeding pursuant to Article 78 of the N. Y. Civil Practice Law and Rules. The Article 78 proceeding was for an order annulling the Housing Authority's determination barring and disqualifying appellant from public contracts for five years. The motion was granted without prejudice to the commencement of a plenary action.

On appeal to the Appellate Division, First Department, the order in the Article 78 proceeding was affirmed without opinion (Jurisdictional Statement, p. 17). On the same

date, on cross appeals, the order in the plenary action was modified in an opinion which stated in pertinent part that:

> "The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief." (*Id.* p. 17)

On consolidated appeals, the New York Court of Appeals held that Public Authorities Law § 2601 is constitutional citing *Matter of Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184, appeal pending No. 635, Oct. T. 1967, decided the same day. The Court held the disqualification to be valid. The Court further held that the fact that the appellant's officer resigned prior to his appearance before the Grand Jury was not controlling where the resignation was virtually contemporaneous with his refusal to sign the waiver of immunity and where it was obvious that the sole purpose of the resignation was to avoid the statutory disqualification. The Court held that while there might be times when the statute would penalize a corporation which "had severed its connection with the recalcitrant officer and which has otherwise been cooperative", the Legislature had provided a procedure for the removal of such disqualification (Public Authorities Law § 2603). The Court concluded that "the appellant's exclusive remedy is the procedure outlined in that statute" (Jurisdictional Statement, pp. 18-19).

REASONS FOR GRANTING THE MOTION TO DISMISS

I

The instant case does not present a justiciable controversy within the jurisdiction of this Court.

Appellants claim that the question in the instant case is whether the assertion of the privilege against self-incrimination may result in its disqualification from bidding on public contracts. Appellant is confusing any individual rights of Mr. Campbell with its own rights. Depending on the facts, two basic claims might be open to Mr. Campbell were he a party to this proceeding. He might allege that his privilege against self-incrimination entitles him not to have coerced testimony introduced against him in a criminal proceeding and he might allege that he has a right not to suffer any penalty merely for having invoked the privilege against self-incrimination. Since he did not testify, his first claim would not be available. Contrast *Garrity* v. *New Jersey,* 385 U. S. 493. The question with respect to Mr. Campbell would thus become whether or not his disqualification was the result of his claim of the privilege against self-incrimination or a lack of candor or some other reason.

The corporation, however, has no interest in and can claim no derivative benefit from Mr. Campbell's privilege against self-incrimination. *United States* v. *White,* 344 U. S. 694. It thus cannot claim that any alleged impairment of Mr. Campbell's right to exercise the privilege gives it a right to assert the protection of his privilege for its own benefit. Any such right of Mr. Campbell would result from a claim of an unfair imposition of a penalty on him. The corporation cannot substitute the imposition of any alleged penalty on itself to complete the relation-

ship required before Mr. Campbell could assert such claim of impairment. And, of course, the corporation has no privilege of its own to assert. *United States* v. *White, supra.*

Whatever right the corporation may claim as a result of its having been disqualified from doing business with the State and from cancellation of its contracts can still be made the subject of a proceeding in the State pursuant to Public Authorities Law § 2603. *South Carolina* v. *Katzenbach,* 383 U. S. 301, 333. This, indeed, was the holding of the New York Court of Appeals. See *supra,* p. 5. Since this remedy, the exclusive remedy, as that Court held, has not been pursued, the decision of the New York Court of Appeals is not final with respect to appellant corporation and no justiciable controversy has been presented for resolution by this Court.

In any event, appellant is bound by the contracts it signed. It was a condition of the contracts, a condition of which all of appellant's officers and directors obviously were well aware, that, upon the refusal of any one of them to testify before a Grand Jury concerning their contracts, disqualification and cancellation would result. Appellant had the option of entering into the contracts on those terms and it cannot now overcome the fact that the contracts were breached. *Fahey* v. *Malonee,* 332 U. S. 245; *Ashwander* v. *Tennessee Valley Auhority,* 297 U. S. 288, 348 (Concurring Opinion); *Booth Fisheries* v. *Industrial Comm.,* 271 U. S. 208; *Buck* v. *Kuykendall,* 267 U. S. 307; *Campbell* v. *City of New York,* 244 N. Y. 317, 155 N. E. 628.

II

The instant case does not present a substantial federal question for review by this Court.

Even if appellant could assert that its disqualification by virtue of Mr. Campbell's refusal to waive immunity vio-

lates some right of its own, its attack on the constitutionality of New York Authorities Law § 2601 is insubstantial. The jurisdictional statement implies that the provision was not inserted because of the necessity for demanding candor on the part of public employees and contractors. It thus apparently regards as inapposite the cases of *Nelson* v. *Los Angeles,* 362 U. S. 1; *Beilan* v. *Board of Education,* 357 U. S. 399; *Lerner* v. *Casey,* 357 U. S. 468 and *Slochower* v. *Board of Education,* 350 U. S. 551. Each of these cases clearly establishes that the State may, under circumstances substantially the same as those in the instant case, require testimony from its employees and contractors with respect to their duties and contracts.

The governmental interest leading to the enactment of the statute was very strong. The need for candor was obviously its motivation. In approving the legislation to deal with the problem of contractors who refused to testify about their dealings, Governor Rockefeller pointed out:

> "Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefit accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract." Memorandum of the Governor, N. Y. State Legislative Annual (1959), p. 431.

The Legislature was concerned not only with obtaining low bidders, but also responsible bidders, and was determined that any contract awarded would best promote the public interest. The Legislature has affirmatively dictated

that it is of the highest importance that there be no collusive bidding or bid rigging for public contracts. This they have done by requiring that in every public contract proper assurances be incorporated by the private contracting party to that effect (See e.g. General Municipal Law, § 103-d). The New York statute is substantially identical with federal requirements. See 41 C.F.R. § 1-1, 317 (1965) (Federal Procurement Regulations).

In order to determine whether or not bidders are responsible, public agencies must be able to insure candor on the part of public contractors and to protect the public from persons or corporations which feel they cannot be candid in their public dealings. The provisions of the statute are in no respect arbitrary in insisting on such candor.

Appellant's claim that the automatic operation of the statute deprives it of due process once more ignores the existence of the hearing provided in the Public Authorities Law § 2603. The fact that that hearing may be obtained only after disqualification does not deprive appellant of due process of law. See *Lerner* v. *Casey, supra; South Carolina* v. *Katzenbach, supra; Bowles* v. *Willingham,* 321 U. S. 503, 520.

Neither *Garrity* v. *New Jersey,* 385 U. S. 493 nor *Spevack* v. *Klein,* 385 U. S. 411, gives substance to the issues sought to be presented. *Garrity* is inapposite because no testimony was used. The *Spevack* case does not purport to overrule the line of cases beginning with *Slochower, supra,* which holds that candor may be required of a public employee. It holds only that the privilege against self-incrimination could not be withheld from an attorney so that he would be denied the opportunity to challenge the relevance to the proceeding of the documents demanded of him. It did not even indicate that candor could not be required of attorneys within the scope of the information the State legitimately could require of them.

In any event, the public contractor, even more than the public employee, must be accountable for its dealings with respect to such public contracts, and the failure of candor required by the contract is intolerable. See *Spevack* v. *Klein, supra,* at 519-20 (concurring opinion). Any other result would render meaningless the whole system of public bidding written into law.

CONCLUSION

For the foregoing reasons the within motion to dismiss should be granted.

Dated: New York, New York, November 8, 1967.

Respectfully submitted,

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